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Written Evidence on Topic 3:

The powers likely to be necessary or justified in primary legislation to incorporate the existing body of EU legislation (the acquis communautaire or acquis) into domestic law upon repeal of the European Communities Act 1972 (ECA), including (but not necessarily limited to):

• powers to ensure the continuation in UK law of the legal order in force upon repeal of the ECA, with only such amendments as are necessary to ensure that the law applicable in the UK continues with the same effect):
• powers to amend domestic primary and secondary legislation implementing EU obligations in line with Government policy objectives, following the cessation of those obligations and the repeal of the ECA):
• powers to amend, in line with Government policy objectives, provisions of EU law presently given direct effect in UK law by operation of the ECA, following the incorporation of those provisions into UK law

Overview

This submission responds to the third issue the Committee raises in its call for evidence on the Great Repeal Bill (GRB) (reproduced on coversheet). It highlights to the Committee the importance of making express provision in the GRB for a replacement legislative instruction to UK courts in place of s2 and s3 of the European Communities Act 1972 (ECA). A replacement instruction is necessary to ensure that the body of EU law currently applicable in the UK (the so-called EU acquis) would continue to apply domestically to the same effect following the UK’s withdrawal from the EU.

This submission summarises (briefly) the terms of the current legislative instruction to UK courts under the ECA with respect to the domestic effect of
EU law. It then outlines a range of possible options open to the Government when preparing any replacement judicial instruction in the draft GRB.

1. The Current Legal Framework: The European Communities Act 1972 as Constitutional Instruction to UK Courts

For the duration of the UK’s membership of the (now) European Union, the ECA has functioned as the source of the domestic constitutional instruction to national courts to give internal effect to EU law in proceedings falling within the scope of Union law. In summary, that Act is interpreted as instructing UK courts to do two things. First, it directs domestic courts to apply EU law ‘as national law’ in accordance with the principle of primacy established by the Court of Justice of the European Union. As the UK Supreme Court summarised in its judgment in Miller [at para.60],

‘The 1972 Act… authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes.’

Secondly, the ECA also instructs UK courts to function as ‘European courts’ when adjudicating disputes that engage questions of EU law. More specifically, s3(1) ECA prescribes that,

‘For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any [EU instrument], shall be treated as a question of law (and, if not referred to the European Court, be
for determination as such in accordance with the principles laid down by and any relevant [decision of the European Court].'

In combination, the two key instructions set out in the ECA – on the domestic effect of EU norms and the principles governing their interpretation respectively – have had a fundamental impact on the position and functioning of UK courts. First and foremost, s2 and s3 ECA work together to guarantee that EU law – including judgments of the Court of Justice – is given full effect within the UK legal order and, in instance of conflict with national law, takes precedence over domestic law.

2. The Great Repeal Bill and UK Courts: Future Options

The UK Government’s announcement that it intends to repeal the ECA through the Great Repeal Bill will terminate the existing framework outlined above. Should Parliament wish to continue to ensure that the body of EU law current applicable in the UK (the so-called EU acquis) continues to apply domestically to the same effect at the point of the UK’s withdrawal from the EU, then it will need to issue a replacement legislative instruction to UK courts to that effect in the GRB.

The flexibility of the UK legal order affords Parliament a range of options with respect to the choice of replacement instruction to UK courts in the GRB. Several of these options are tried and tested outside the EU context. Most importantly perhaps, they each differ in the extent to which they function effectively to ‘lock’ domestic law to the EU legal order – and to judgments of the Court of Justice of the European Union – post withdrawal. Finally, it is worth emphasising that any decision on the future application of EU law within the UK will depend, in part, on the outcome of the Art 50 TEU exit
negotiations. In particular, the terms of the anticipated ‘withdrawal agreement’ and any subsequent UK/EU bilateral treaties will largely determine the extent to which domestic law is required both legally – as a matter of international law – and also practically to maintain effective links with the EU legal order.

2.1. Option 1: Repeal and Replace the Current Instruction to UK Courts

For maximum continuity between the UK and EU legal orders post withdrawal, Parliament could include a so-called ‘continuance clause’ in the GRB as a replacement to the current instruction to UK courts set out in s2 and s3 ECA.¹ Such a clause could be framed either statically or dynamically. Under the first alternative, Parliament would specify a cut-off date with respect to the future binding status of Court of Justice judgments as a matter of UK law. Under the second prospective approach, a continuance clause would direct UK courts to continue to apply the nationalized EU acquis in accordance with EU law (and Court of Justice judgments) as it develops subsequent to the UK’s withdrawal.

With respect to the static option, there are several key issues that require careful consideration. In particular, what should UK courts do when faced with ambiguity in existing areas of EU law – including decisions of the Court of Justice? If Parliament does not address this issue expressly in its replacement instruction in the GRB, then it will fall ultimately to UK courts to resolve. The practical effect of that omission may prove significant over time. In effect, it would leave UK courts considerable scope to determine the

practical effect of the body of EU law declared ‘binding’ domestically at the point of withdrawal through a static continuance clause in the GRB. At present, under the ECA, UK courts are able (and, under certain circumstances, compelled) to refer questions over the correct interpretation of EU law to the Court of Justice using the preliminary reference procedure (Art 267 TFEU). However, that procedure will terminate at the point of the UK’s withdrawal. It is also unlikely to be maintained on a permanent basis under the terms of any future UK/EU bilateral agreement(s). The UK Government is strongly opposed politically to the Court of Justice as a judicial institution (see here e.g. its White Paper on Brexit).

In addition, a static continuance clause would (ideally) also need to direct UK courts on the position of repatriated EU law vis-à-vis ordinary domestic law. In particular: should UK courts continue to give primacy to the nationalised EU acquis over all conflicting national law after withdrawal as before under the ECA? The repeal of the ECA will end the primacy of EU law within the UK legal order. In the absence of any replacement legislative instruction in the GRB, there is no reason to expect UK courts to maintain the primacy to the nationalized EU acquis over ordinary national law – its reasoning on the ECA (see again e.g. Miller) suggests otherwise. Accordingly, should Parliament wish to maintain the domestic application of the EU acquis to the same effect post withdrawal, it would be necessary (or at the very least desirable) to include an express instruction to that effect in any static continuance clause in the GRB.

A dynamic continuance clause presents additional challenges. First and foremost, Parliament would need to determine how it intends to ‘lock’ the UK and EU legal orders together prospectively – to the extent that it wishes to do so. One option would be to attribute direct effect to specific parts of the EU acquis that the UK has agreed to adhere to after withdrawal under the
terms of the (expected) Art 50 TEU withdrawal agreement or, likewise, on a more permanent basis, under any subsequent UK/EU bilateral treaty(ies). The ECA is not the only precedent for this first option. Parliament has already legislated, for example, to provide for the direct effect of external legal norms in other contexts. This includes, most comprehensively, the incorporation of Convention (ECHR) rights into the domestic legal order through the Human Rights Act 1998.

Of course, it is important to stress that, with respect to ECHR rights, the manner in which Parliament has attributed direct effect to incorporated Convention rights is very different to the approach under s2 and s3 of the ECA. With respect to ECHR obligations, Parliament has placed important limits on UK courts’ powers with respect to the domestic enforcement of the specific Convention rights incorporated into national law through the HRA. Under the HRA, for instance, UK courts do not enjoy any comparable competence to review primary legislation (i.e. Acts of Parliament) for compatibility with Convention rights (see s4 HRA). Likewise, the instruction to interpret national law in line with Convention rights – including ECHR judgments – is far weaker than that which binds UK courts under the ECA (see s3 HRA) (this is discussed further below).

In any case, given the UK Government’s political hostility to direct effect, the first option to structure a dynamic continuance clause – legislating to preserve the substance of the current instruction to UK courts under the ECA – is unlikely to find its way into the GRB. The Government’s White Paper on Brexit makes no secret of its political hostility towards direct effect of EU law – together with judgments of the Court of Justice. Overall, the UK Government’s thinking marks a clear departure from the present approach to the enforcement of international norms (through private litigation before
national courts using directly effect rights) in favour of the introduction of weaker, State-managed dispute resolution mechanisms.

A softer option would be to instruct UK courts to interpret the nationalised EU acquis in conformity with Union law as it develops once the UK exits the EU. As a template for that instruction, a dynamic continuance clause in the GRB could seek to replicate the approach that is currently applied under s3 HRA (noted above). That provision directs UK courts to interpret UK law (including primary legislation) in conformity with the Convention rights incorporated into domestic law through the HRA. It is also worth noting that a similar interpretative obligation already binds UK courts in the EU law context – through s3 of the ECA. Under the doctrine of ‘indirect effect’ developed by the Court of Justice, UK courts are subject to a general obligation to interpret national law in line with EU law in disputes falling within the scope of the EU Treaties (e.g. Von Colson). That obligation is derived from the same domestic instruction (the ECA), but applies over and above the requirement to attribute primacy to directly effective EU norms in instances of conflict with provisions of national law.

Although ‘softer’ than direct effect, an interpretative obligation of the above kind would have the advantage of maintaining close links between the UK and EU legal orders, post-Brexit. Specifically, it would instruct UK courts to continue to develop national law in harmony with future developments in Union law, whilst at the same time preserving space for national law to diverge as a matter of principle. In the hands of a willing court, a legislative instruction in the GRB to interpret UK law in conformity with, for instance, developments in EU case law, could effectively function in proxy for direct effect proper. Even in the absence of such an approach, however, an interpretative instruction of the above kind is arguably rather attractive.
politically: it satisfies the Government’s ‘take back control’ narrative, whilst providing for the maintenance of practical links between the UK and EU legal orders post-Brexit. Ultimately, it would fall to UK courts to determine the strength of any interpretative instruction over time – here, a review of domestic case law on s3 HRA could provide useful insights.

Of course, it is important to highlight that the approach of UK courts to s3 HRA is itself the subject of criticism within Government – recall here its proposal to replace the HRA (including s3 HRA) with a British Bill of Rights. Thus, even as a softer and arguably rather appealing option, the introduction of an interpretative instruction in the GRB along the lines of s3 HRA may face just as much political hostility as any proposal to maintain a legislative basis in the GRB for the continued direct effect of EU law post-Brexit (discussed above).

2.2. Option 2: Repeal without Replacement Instruction to UK Courts

It is also open to Parliament to repeal the ECA without issuing any replacement instruction to UK courts with respect to the domestic effect of the EU acquis. The GRB could simply seek to ‘nationalise’ that body of law without reference to its future domestic interpretation and/or enforcement. Should that be the case, UK courts can legitimately be expected to interpret the nationalised EU acquis in accordance with ordinary rules of domestic judicial interpretation. It would arguably be rather bold for UK courts to conclude otherwise; for example, by asserting that the nationalized EU acquis should be attributed 'special status' vis-à-vis ordinary domestic law in absence of any replacement legislative instruction to that effect. As the UKSC reiterated in Miller, UK courts locate the current instruction to afford special
treatment to the EU *acquis* expressly in the ECA and the doctrine of parliamentary sovereignty [at para. 60].

Of course, UK courts could be bolder and see an opportunity to craft a new constitutional approach. More likely, however, in the absence of any replacement instruction in the GRB, UK courts would continue to forge links between UK and EU law using domestic principles of judicial interpretation – specifically, the comparative method of interpretation. Judgments of the Court of Justice would, in such circumstances, carry only persuasive authority as ‘foreign law’ – a point the UKSC anticipates in *Miller* [at para. 80]. It is difficult to predict accurately the degree to which UK courts would interpret the nationalised EU *acquis* in conformity with intervening developments in EU law after UK withdrawal. In the absence of any specific direction to do so, UK courts would enjoy a degree of discretion with respect to the influence on trajectory of domestic law of, in particular, Court of Justice judgments as sources of non-binding persuasive authority. Practically, the pull towards conformity may be strong in particular substantive areas. By contrast, UK courts may exploit their new freedom to reverse or modify future evolutions in EU law more antagonistic to domestic judicial preferences or traditions. In any case, upper courts will inevitably take the lead in determining the parameters of domestic judicial approaches to EU law post-Brexit under this model – and over time.

**Concluding Remarks**

Managing the repeal of the European Communities Act 1972 through the Great Repeal Bill is not simply a matter of nationalising the EU *acquis* (itself no easy task) and perhaps, more controversially, establishing sweeping new executive powers to authorise future adjustments to substantive norms. These are both critical issues – as the Committee’s call for
evidence rightly identifies. In addition, and as this submission highlights, it also involves fundamental decisions about how the nationalised EU acquis (together with provisions any future bilateral UK/EU agreements) should be enforced and interpreted domestically and by whom.

Should Parliament wish to continue to ensure that the body of EU law currently applicable in the UK (the EU acquis) continues to apply domestically to the same effect at the point of the UK’s withdrawal from the EU, then is will need to issue a replacement legislative instruction to UK courts to that effect in the GRB. As this submission outlines, the flexibility of the UK constitutional order affords Parliament considerable freedom to determine what model to adopt. Several options are tried and tested outside the EU context – the incorporation of Convention (ECHR) rights through the HRA is the most obvious example.

Most importantly perhaps, the available options each differ in the extent to which they function effectively to ‘lock’ domestic law to the EU legal order post withdrawal – and to judgments of the Court of Justice of the European Union in particular. Again, in conclusion, it is worth stressing that any decision regarding the future application of EU law within the UK following its exit from the Union will depend, to a considerable extent, on the outcome of the Art 50 TEU exit negotiations. In particular, the terms of the anticipated ‘withdrawal agreement’ and any subsequent UK/EU bilateral treaties will largely determine the extent to which domestic law is required both legally – as a matter of international law – and also practically to maintain effective links with the EU legal order.

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